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In The Supreme Court of the United States

JOHN A. RAPANOS, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE ASSOCIATION OF STATE AND INTERSTATE WATER POLLUTION CONTROL ADMINISTRATORS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

This brief is the first *amicus* brief ever filed by the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA). ASIWPCA takes this unprecedented step to emphasize the importance of this case to State protections for vital natural and economic resources.

Founded in 1961, ASIWPCA is a nonpartisan organization for State and Interstate officials who implement surface water protection programs throughout the nation. As the State and Interstate officials with direct, day-to-day responsibility for protecting our nation's waters, we submit this brief to show that continued federal protection of intrastate non-navigable tributaries and their adjacent wetlands is necessary to preserve the effective State-federal partnership to protect our nation's waters established by the Clean Water Act (CWA). ASIWPCA's interest in this case could not be greater.

SUMMARY OF ARGUMENT

1. The stakes in this case are extraordinarily high. The statutory term at issue – "waters of the United States" – is integral not just to the permitting requirements for dredge and fill material, but also to the basic pollution control provisions in section 402 and a host of

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amicus*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief as reflected in letters filed with the Clerk of the Court.

other critical water quality provisions throughout the Act. If this Court overturns the longstanding federal protections for non-navigable tributaries and adjacent wetlands under the Clean Water Act, the Act would no longer regulate the discharge of sewage, toxic pollutants, and fill into these vital resources, which comprise the large majority of our nation's rivers, streams, and other waters.

Continued federal protection of intrastate non-navigable tributaries and adjacent wetlands is necessary to prevent devastating injury to downstream States, such as pollution and flooding, which would threaten lives and harm economic resources, including our nation's traditional navigable waters.[2] The States are deeply committed to protecting these intrastate resources, but they recognize the compelling national interest in protecting them, and they lack the resources and institutional capacity to do the job alone.

Because virtually every State is a downstream State, an overwhelming consensus exists among the States regarding the need for this continued federal protection. Of particular concern to the States is the inevitable competition for jobs and economic growth that could prevent an upstream State from giving adequate consideration to the harm to downstream States that would result from despoliation of intrastate tributaries.

For example, the State of Montana estimates that for every acre of wetlands destroyed in that State, one million

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[2] Like Respondents and other *amici* supporting Respondents, we use the term "traditional navigable waters" to refer to waters that are used, or susceptible to use, in interstate or foreign commerce.

gallons of water run downstream. Destruction of such wetlands contributes to catastrophic economic losses such as the 1993 flood of the Missouri and Mississippi Rivers. This tragic event killed 70 people, caused more than $10 billion in property damage, and disrupted the use of those rivers as channels of commerce.

So too with pollution. Intrastate tributaries of the Little Blue River in Nebraska, for instance, receive priority protection from federal officials because they play a vital role in preserving the Little Blue as a drinking water source for downstream Kansas communities.

2. Existing State water quality programs depend directly on longstanding federal protections for intrastate non-navigable waters. Invalidation of these established federal protections would pull the rug out from under State officials and leave a regulatory void that the States could not easily fill.

Most States lack independent regulatory programs that would fully protect intrastate wetlands, but instead rely on the longstanding state-certification requirements under section 401 of the Clean Water Act for federally issued permits. This certification authority allows the States to protect valuable natural resources through the federal permit program without undertaking prohibitively expensive administration and enforcement of independent State permitting programs. Excluding wetlands adjacent to intrastate waters from federal protections would strip the States of this longstanding authority to protect these critical resources.

Moreover, the State-federal partnership under the Clean Water Act is not an easily bifurcated pie, but a mosaic of interdependent parts based on deeply rooted

understandings that federal and State officials have reached over 30 years. Invalidation of longstanding federal protections would not promote State prerogatives, but instead subject the States to regulatory chaos and greatly undermine efficient regulatory processes that have arisen over time.

Perhaps most importantly, many States simply lack the resources and institutional capacity to protect intrastate tributaries and their adjacent wetlands if federal protections for these resources were struck down. Even in States with the resources to fill the gap, experience shows that they could suffer devastating losses during the time it would take to enact and implement new State protections.

3. The plain meaning of "waters of the United States" includes waters within our nation's borders regardless of their navigability, a reading compelled by both text and context. Indeed, section 404(g) – which authorizes a State to administer its own permit program for dredge and fill material in lieu of the federal program – would be rendered meaningless if "waters of the United States" were read to exclude intrastate non-navigable waters, including their adjacent wetlands.

The doctrine of severe constitutional doubt does not require a different conclusion. For more than a century, the Court has recognized that Congress's authority over traditional navigable waters encompasses the entire watershed, including non-navigable tributaries. This authority may be used to promote not only navigation, but flood control, water quality, and other values. To protect traditional navigable waters as channels of commerce from the ravages of flooding and pollution, the Congress may safeguard non-navigable intrastate tributaries and adjacent

wetlands as a class, even though individual instances of despoliation might have only a small effect on navigable waters.

ARGUMENT

This brief draws heavily from comments submitted in 2003 by ASIWPCA and the executive departments of more than three-quarters of the States to the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency arguing against modification of the regulatory definition of "waters of the United States" under the Clean Water Act.[3] The comments recognized that in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), this Court invalidated the Migratory Bird Rule as a stand-alone basis for federal jurisdiction under the Act. But *SWANCC* did not address tributaries and adjacent wetlands, and the State comments explained why the Corps and EPA should retain the longstanding federal protections for these waters. In response to these and thousands of other comments, the

[3] The comments were submitted in response to an Advance Notice of Proposed Rulemaking (ANPRM) issued by the Corps and EPA. *See* 68 Fed. Reg. 1991 (Jan. 15, 2003). They reflect the views of the governors, environmental or natural resource protection agencies, or health departments of these States. We cite these comments as "[State name] Comments at **." Full citations for cited comments appear in our Table of Authorities, and a list of the comments from these States urging continued federal protection is set forth in Appendix A. For the Court's convenience, we have assembled copies of these comments at http://www.asiwpca.org/statecomments.htm. As the Court knows, two States (Alaska and Utah) have filed an *amicus* brief in support of Petitioners.

Corps and EPA continue to exercise federal jurisdiction over these waters.[4]

As explained in the State comments and reiterated in this brief, the stakes in this case are extraordinary for two reasons. First, the statutory term at issue – "waters of the United States" – is the jurisdictional lynchpin not only for the requirements regarding dredge and fill material in section 404 of the Act, but also for the Act's basic pollution controls under the "National Pollution Discharge Elimination System" established by section 402 (known as NPDES requirements), State water quality standards under section 303, and several other key statutory provisions.[5] EPA estimates that more than 40 percent of individual NPDES discharges outside Alaska are into headwaters, and that more than 90 percent of drinking water intakes, serving 110 million people, are in headwaters.[6] Reading the Act as covering only traditional navigable waters and adjacent wetlands would eliminate longstanding federal protections for these vital resources.

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[4] For example, the existing regulations continue to define "waters of the United States" to include intrastate waters if their degradation or destruction would harm interstate commerce (*see* 40 C.F.R. § 230.3(s)(3)), as well as wetlands adjacent to intrastate waters. *See id.* § 230.3(s)(7).

[5] *See, e.g.*, Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1991-93 (Jan. 15, 2003) (recognizing that "waters of the United States" defines the regulatory scope of sections 303, 311, 401, 402, and 404).

[6] *See* Letter from Benjamin H. Grumbles, Assistant Administrator, U.S. EPA, to Jeanne Christie, Association of State Wetland Managers, at 2 (Jan. 9, 2006) (attached as an Appendix to the Brief of *Amici Curiae* Association of State Wetland Managers, *et al.*, in Support of Respondent United States).

Second, Petitioners' contention that "waters of the United States" includes only traditional navigable waters and adjacent wetlands would eviscerate longstanding federal protections for the large majority of our nation's waters. For example, in the State that gave rise to the cases at bar, traditional navigable rivers and streams cover an estimated 496 miles out of 54,300 total miles of rivers and streams, or less than one percent.[7] Nationally, traditional navigable waters comprise a small fraction of the geographic jurisdiction long recognized by the Corps, EPA, and federal courts.[8]

To be sure, the Clean Water Act must be read to preserve "the primary responsibilities and rights of States" to protect land and water resources. 33 U.S.C. § 1251(b). Petitioners argue that the elimination of federal protections for most of this country's waters is necessary to protect State prerogatives. Rapanos Br. 20-21, 28-31; Carabell Br. 31-33. But, as this very statutory provision indicates, the Clean Water Act preserves the States' primary responsibilities by empowering them to "implement the permit programs," "manage the construction

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[7] Memorandum from Diana Klemans, Chief, Surface Water Assessment Section, Dep't of Envt'l Quality, to Peter Manning, Division Chief, Dep't of Attorney General (Jan. 10, 2006), available at http://www.communityrights.org/michiganmemo.pdf; *see also* Arizona DEQ Comments at 2 (95 percent of Arizona surface waters are ephemeral or intermittent streams); Rhode Island Comments at 1-2 (about 85 percent of total tributary miles in the State are non-navigable).

[8] *See* Lance D. Wood, *Don't Be Misled, CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 ENVT'L L. REP. 10187, 10187 (2004) (estimating that traditional navigable waters constitute less than one percent of the geographic jurisdiction long recognized by the Corps, EPA, and the courts).

grant programs," and "consult with the Administrator in the exercise of his authority" through the State certification and consultation requirements under the Act, not by limiting the geographical reach of the Act. 33 U.S.C. § 1251(b). As the State officials with frontline responsibility for protecting our nation's waters, we show that these longstanding federal protections are essential to protect vital State interests and preserve the effective State-federal partnership established by the Clean Water Act.

I. The Despoliation of Intrastate Tributaries and Their Adjacent Wetlands Causes Pollution and Flooding in Downriver States, Making it Impossible for States to Solve this National Problem on Their Own.

The issues raised by this case are: (1) whether the Clean Water Act – described by this Court as an "all-encompassing program of water pollution regulation"[9] that protects "virtually all bodies of water"[10] – authorizes the Corps and EPA to protect intrastate tributaries, including their adjacent wetlands; and (2) whether Congress has authority to protect these waters under the Commerce Clause and Necessary and Proper Clause.

Non-navigable rivers, headwater streams, and their adjacent wetlands provide valuable economic and ecological benefits, including direct benefits to traditional navigable waters. Protecting these non-navigable tributaries from toxic discharges is essential to maintaining the ecological integrity of downstream navigable lakes and

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[9] *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981).

[10] *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

rivers. In addition to these obvious benefits, wetlands act as giant sponges to control flooding by storing excess water during heavy rainfall, thereby greatly reducing loss of life and economic damage in surrounding areas.[11] Wetlands also act as nature's "kidneys" by filtering out silt, toxins, and other impurities from polluted runoff before those waters flow into our lakes and rivers.[12] The question here is whether States must protect these resources alone using their police power and other authorities, or whether the federal government has concurrent constitutional and statutory authority.

The States have a pragmatic and important answer to this question. They take seriously their responsibility to protect their natural resources for the benefit of their citizens, with some States supplementing federal protections with unique State protections that, for example, establish buffer zones around streams and wetlands. But at the same time, the States recognize that there is a compelling national interest in protecting intrastate tributaries and their adjacent wetlands, and they know they cannot adequately protect these resources acting

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[11] Wetlands in the continental United States save an estimated $30+ billion in annual repair costs due to flood damage. *See* Lois J. Schiffer and Jeremy D. Heep, *Forests, Wetlands and the Superfund: Three Examples of Environmental Protection Promoting Jobs*, 22 IOWA J. CORP. L. 571, 590 (1997) (citing National Audubon Society, *Valuing Wetlands: The Cost of Destroying America's Wetlands* 24-27 (1994)).

[12] Cities save millions of dollars annually in wastewater treatment costs because wetlands filter out pollutants. *See* Schiffer and Heep, *supra* note 11, at 591 (citing Vicki Monks, *The Beauty of Wetlands*, 34 NATURAL WILDLIFE 20 (1996)); *see also United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000) ("Wetlands perform a vital role in maintaining water quality by trapping sediment and toxic and nontoxic pollutants before they reach streams, rivers, or other open bodies of water.").

alone. This concern about the inadequacy of State-by-State regulation is pervasive in the State comments on the ANPRM. *See, e.g.*, Indiana Comments at 2 ("Even if we manage to fill the gaps that would be created by a redefinition of 'Waters of the U.S.' in Indiana, nothing guarantees that all of our nearby states will also fill these gaps."); Vermont Comments at 8 ("Vermont cannot control its own destiny and must rely on effective, uniform regulation at the federal level to manage these out-of-state resources that significantly impact the state's economy."). Texas effectively summarizes this concern:

> Generally speaking, state regulation is an inadequate solution to interstate issues because no matter how comprehensively one state regulates wetlands or water quality, if a neighboring state does nothing or very little, water quality and consequently the public health, environment and economy will be impacted in all the surrounding states and even nationally.

Texas Parks and Wildlife Dep't Comments at 4.

Another concern expressed throughout the State comments is that competition among States for jobs and economic growth might limit their ability to fill any gaps left by a rescission of existing federal protections. *See, e.g.*, Delaware Comments at 14 ("Loss of federal regulation would put environmentally protective states at an economic disadvantage relative to less protective neighbor states, removing the 'level playing field' that now exists and creating pressure for reduced state protection."); Maine Comments at 1 ("[T]he competitive disadvantage this may impose on Maine with respect to other states might lead to pressures to roll-back our own protections."); New York DEC Comments at 2 ("It is imperative that we

maintain strong nationwide Clean Water Act standards to ensure that individual states, or groups of states, cannot benefit from the location of industry, business, or other activities within those states, on the expectation of lower environmental regulatory hurdles."). As the Court observed in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), "prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause." *Id.* at 282.

The on-the-ground experience of the States hammers these points home. Montana's comments, for example, draw us back to one of the worst flooding disasters in our nation's history, the 1993 flood of the Missouri and Mississippi Rivers, which took 70 lives, caused more than $10 billion in property damage, and disrupted the use of those rivers as channels of commerce. *See* Montana Comments at 4; New York Att'y Gen'l Comments at 19. Montana explains, "The 1993 flood in the Upper Missouri River Basin is a good case study of the value of wetlands in absorbing and moderating flood flows." Montana Comments at 4. Wetland destruction in the basin "represents the loss of up to 90 million acre-feet of potential flood storage, which is more than twice the volume of the 1993 Mississippi River flood at St. Louis." *Id.* For every acre of wetlands destroyed, Montana estimates "an average of 1 million gallons of water run off quickly downstream instead of being stored and slowly released as the river level drops." *Id.*

Montana emphasizes that it is a "headwater state." *Id.* Headwater States export floodwaters, with the greatest flood damage frequently occurring hundreds of miles and many States downstream. Much of the water that Montana

would otherwise export is contained in wetlands that play an invaluable role by "absorbing runoff and moderating flood flows for downstream states." *Id.* Montana recognizes the benefits of preserving these wetlands, but concludes that "[t]hese wetlands will be highly vulnerable to filling and draining in the absence of protection under Section 404 of the CWA." *Id.* at 2. It is politically difficult – if not impossible – for a State to tell its own citizens that they have to forego development on their own property in order to prevent the risk of exacerbating flooding in a State downstream. That, Montana argues, is the role of the federal government.

North Dakota tells a similar story about its wetlands and flooding on the Red River, noting that "[w]etland drainage is known to have contributed to the recent flooding problems" in the river basin. North Dakota Comments at 2. The Red River originates with headwaters in North Dakota, South Dakota, and southern Minnesota. It flows north, forming the border between Minnesota and North Dakota until crossing into Canada, where it flows through the City of Winnipeg and ultimately empties into Lake Winnipeg.

The 1997 Red River flood was catastrophic, burying towns including Grand Forks, North Dakota, East Grand Forks, Minnesota, and Ada, Minnesota. At Grand Forks, the river was more than 26 feet above flood stage. The flood continued into Canada where it peaked just inches below the levees that protect Winnipeg, a city of more than 650,000 that serves as a Canadian provincial capital. *See, e.g.*, *North Dakota's Runaway River*, BOSTON GLOBE, Apr. 22, 1997 at A14; Dirk Johnson, *Flooding Crests in Ravaged City: Residents Face Weeks of Anxiety*, N.Y. TIMES, Apr. 22, 1997 at A1; Anthony DePalma, *Winnipeg Journal: As Red*

River Crests, Manitoba Holds its Breath, N.Y. TIMES, May 3, 1997, Section 1, at 4.

The story of the Red River flood illustrates the international dimension of the problem of protecting headwater wetlands and streams. North Dakota and Minnesota have every incentive to protect their citizens against catastrophic floods. But they cannot control the actions of the other States in the Red River watershed. And the solution that is best for North Dakota or Minnesota might not be best for the United States. A decision to respond to flood risks by increasing the size of dikes and levees – instead of protecting wetlands – will result in the export of floods to Canada and could cause deterioration in our nation's relationship with Canada. While flooding is a local problem, it is simultaneously a national and international problem.

So is pollution of our nation's waters. Nebraska explains that wetlands and intermittent and ephemeral streams that form part of the watershed of the Little Blue River in that State have been prioritized for protection by the federal government because of the role these resources play in protecting the Little Blue as a drinking water source for Kansas communities, including Kansas City. Nebraska Dep't of Envt'l Quality Comments at 3. Nebraska concludes that "[w]ithout solid CWA protection, impacts to drinking water downstream could prove serious and extremely costly." *Id.*

Indiana gives a more complex, but even more compelling, example of the need for a federal role in limiting the spread of a "dead zone" in the Gulf of Mexico. Indiana explains: "Wetlands and headwater streams are particularly valuable for their ability to filter pollutants such as

nitrate from water. Nitrate laden runoff is a growing concern nationally and clearly moves across state lines." Indiana Comments at 2.

Runoff of nutrients such as nitrate (a particularly mobile form of nitrogen) and phosphorus harms the health of many water bodies through eutrophication, which occurs when an excessive supply of nutrients stimulates the growth of algae, whose subsequent death produces organic decay. The decay of organic matter depletes the dissolved oxygen in the water required for aquatic life. In the resulting hypoxic area or "dead zone," a severe oxygen deficiency causes most aquatic organisms to suffocate. Locally, excessive nutrient loads decrease the resource value of rivers, lakes, and estuaries, hindering recreation, fishing, hunting, and aesthetic enjoyment.

Nationally, hypoxia is plaguing water bodies – including the Gulf of Mexico, the Chesapeake Bay, and the Long Island Sound – that are vital to the nation's economic future. In recent years in the Gulf, there has been a dead zone the size of New Jersey located off the Texas and Louisiana coasts. As the National Oceanic and Atmospheric Administration explains, "the hypoxic zone forms in the middle of the most important commercial and recreational fisheries in the coterminous United States and could threaten the economy of this region of the Gulf."[13] Congress responded directly to this problem in 1998, enacting the Harmful Algal Bloom and Hypoxia Research and Control Act of 1998, Title VI of Public Law 105-383.

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[13] National Oceanic and Atmospheric Administration, *Hypoxia in the Gulf of Mexico: Progress towards the completion of an Integrated Assessment* (available at http://oceanservice.noaa.gov/products/pubs_hypox.html#Intro).

Among Congress's findings were that "53 percent of United States estuaries experience hypoxia for at least part of the year" and that "harmful algal blooms may have been responsible for an estimated $1,000,000,000 in economic losses during the past decade." 33 U.S.C. § 1451.

While the national and local problems are linked, the solution to these problems varies. The reason stems from differences in the chemical characteristics of nitrate and phosphorus. Nitrate is highly mobile and water soluble, while phosphorus is immobile and quickly attaches itself to the soil. Thus, locally, phosphorus is often the biggest nutrient problem; nationally, the problem is nitrate and other forms of nitrogen. *See generally* Standards for the Use or Disposal of Sewage Sludge, Part II, 58 Fed. Reg. 9248, 9276 (Feb. 19, 1993).

Because Indiana wants to protect its farmers and its water, it regulates phosphorus, the "easier to regulate co-limiting nutrient in Indiana's waters." Indiana Comments at 5. Indiana admits that political realities mean that it "has not regulated nitrate discharges in the past and probably may not regulate this nutrient in the future * * * ." *Id.* At the same time, however, Indiana wants the "federal government to be proactive" in protecting headwater streams and wetlands because they are effective filters of nitrogen, and their loss could increase regulatory burdens for downstream States. *Id.* at 1. Leaving the protection of such water resources to the States, Indiana suggests, would be a disaster, "a patchwork quilt of uneven regulation [that] will threaten overall water quality." *Id.*

States such as Michigan and New Jersey reach the same conclusion but from a different perspective: that of the downstream State. Michigan and New Jersey are the

only two States that have assumed responsibility for implementing section 404 to protect wetlands and other waters from dredging and filling. These states strongly support a broad Clean Water Act because the health of their citizens depends upon the actions of other States, which may not fill the gaps left by the federal government's retreat from the field of water pollution prevention. In Michigan's words:

> [G]iven the fundamental importance of our freshwater resources to the public, it is essential that the federal standards be maintained not only in Michigan but in states whose actions impact Michigan. The State of Michigan exists on two peninsulas in the center of the Great Lakes, and we are ever aware that the quality of those interstate and international waters that surround us is influenced not only by the actions of our own citizens, but by those of other states (and other nations).

Michigan Comments at 4.

New Jersey is even more pointed and specific in its comments, noting that, in its view, its upstream neighbor New York does not regulate certain wetland areas in New York that provide important downstream benefits to New Jersey. Federal regulation, New Jersey concludes, "therefore plays an essential role in the protection of these areas and consequently the water resources that they affect within New Jersey." New Jersey Comments at 2. New York's comments reinforce New Jersey's concern, recognizing that there are "numerous" non-navigable streams and wetlands not covered by its environmental programs that "are reliant upon Sections 404 and 401 of the Clean Water Act regulation" for protection. New York DEC Comments

at 2. New York acknowledges it is "not likely that alternative conservation programs or regulations at the state or local level will provide adequate or appropriately broad surrogate protection should Clean Water Act jurisdiction be reduced." *Id.* "Strong nationwide protection," New York argues, "ensures that upstream states cannot export pollutants to downstream communities." *Id.*

II. State Water Quality Protections Are Inextricably Enmeshed with Longstanding Federal Protections and Would Be Severely Undermined by Constricting those Federal Protections.

The phrase "cooperative federalism" is not a meaningless bromide, but a daily reality for the State officials directly responsible for protecting our nation's waters. The efficacy of this State-federal partnership depends heavily on the definition of "waters of the United States" because this term provides a key jurisdictional limit throughout the entirety of the Clean Water Act. *See* page 6, *supra*.

Petitioners suggest that the Court need not be concerned about the harm that would result from eliminating federal protections for intrastate non-navigable waters because, in their view, the States could step in to fill the regulatory gap. This argument ignores the on-the-ground reality of our nation's water protection programs.

First, some two-thirds of the States lack independent regulatory programs that would fully protect intrastate wetlands. *See* Jon Kusler, Ass'n of State Wetland Managers, *The* SWANCC *Decision: State Regulation of Wetlands to Fill the Gap*, at 13-14 (Updated and Revised March 4, 2004), available at http://www.aswm.org/fwp/swancc/aswm-int.

pdf. Instead, they fulfill their responsibilities to the State-federal partnership under the Act through the certification process established in section 401, which gives each State authority to prevent the issuance of a federal permit if the State determines it would violate the Act.[14]

Through this certification authority, many States implement vigorous protections for intrastate wetlands without the prohibitive expense of creating and administering independent State permitting programs. *See, e.g.*, New Mexico Dep't of Game & Fish Comments at 4-6 (discharges into wetlands and other intrastate waters from industrial sources contaminated groundwater and surface water used for agriculture, livestock, and other commercial enterprises, but through its section 401 authority, New Mexico has made "significant strides" in protecting against this harm without the burden and expense of a separate permitting scheme); Massachusetts Dep't of Envt'l Protection Comments at 3 ("Reduced federal protections, and the associated contraction of 401 jurisdiction, will result in the loss of * * * valuable and threatened habitats.").

Second, for many years States have fully integrated their water protection programs into the federal program. The State-federal partnership is not an easily bifurcated pie, but a mosaic of interlocking and interdependent parts. It has developed over the course of 30 years, with the States relying on federal protections for many intrastate

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[14] 33 U.S.C. § 1341 (requiring an applicant for a federal permit for activity that might result in a discharge into U.S. waters to provide a certification from the relevant State or regional water pollution control agency that the discharge will comply with specified provisions of the Act).

waters. *See, e.g.*, ASIWPCA Comments at 2 (if established federal protections are constricted, "[r]egulatory confusion would ensue as each state in turn adopts a different set of procedural and substantive requirements."); Massachusetts Dep't of Envt'l Protection Comments at 1 (restricting federal protections "will result in longer state permitting review time for many projects"); Minnesota Comments at 8, 11 (changes in federal protections will jeopardize long-standing "institutional arrangements" in the State, which have achieved an "optimal" balance in the State-federal partnership); Wisconsin Comments at 2 ("Any change in federal jurisdiction will require states to analyze the impact on their programs and enter into a costly political process to determine the applicable and appropriate scope of state programs and jurisdiction.").

The views of the State of Michigan are especially salient because it is one of two States (with New Jersey) that have directly assumed responsibility for the section 404 program. Michigan emphasizes that "[a]lthough it may appear counterintuitive, * * * a patchwork reduction in federal jurisdiction would significantly decrease the efficiency of the state/federal program, due to the need to differentiate between 'federal' and 'non-federal' wetlands, and impose much greater responsibility for coordination with other federal resource programs on the permit applicant." Michigan Comments at 2.

Under Michigan's existing section 404 program, the landowner files a single application with the State, which is then reviewed for compliance with a wide range of State and federal requirements, including endangered species protections, water quality standards, coastal zone protections, historic preservation requirements, and floodplain impacts. The process is seamless, and State law requires a

final decision within 90 days. *Id.* at 14. To the extent that federal jurisdiction is curtailed, however, Michigan's ability to coordinate with other federal programs would be eliminated, leaving the applicant to negotiate with those programs individually, an extremely burdensome process. *Id.* A patchwork system would require far more bureaucracy and undercut the efficient State-federal partnership currently in place. It would be especially ironic if this active partner, the first State to assume administration of the section 404 program, were to suffer harm to its ecosystems and economy due to a misguided notion of federalism and State prerogatives.

Third, many States simply do not have the resources and institutional capacity to protect intrastate waters if longstanding federal protections were invalidated. Wyoming put it bluntly, insisting that it is "naïve" to expect the States to fill the regulatory gap in an adequate fashion, particularly in rural settings where the need for protection is the greatest. Wyoming Comments at 6; *see also* Nebraska Dep't of Envt'l Quality Comments at 1 (curtailment of federal protections would "strain state resources and dramatically reduce our ability to protect the waters of the State."); Pennsylvania Comments at 3 (any assumption that States would fill the regulatory gap ignores "political, budgetary [and] staffing realities").

The State that gave rise to *SWANCC*, Illinois, likewise opposes any modification of the regulatory definition of "waters of the United States." This position is especially noteworthy because the landowner in *SWANCC* represented to this Court that federal protections were "objectionably intrusive into a well-functioning state regulatory

scheme."[15] But two years later the Illinois Department of Natural Resources forcefully argued to the Corps and EPA that curtailment of federal jurisdiction "would undermine the State of Illinois 'no net loss' goals, adversely impact Illinois' important wetland resources and degrade our recreational economy." Illinois Comments at 2. Illinois stressed that restricting the federal role would imperil some of the most pristine wetlands that remain, and "[i]f we destroy non-navigable streams (tributaries), we will soon imperil the larger waterways as well." *Id.* at 1.

Finally, even in States with the resources to help fill a regulatory gap, during the time it would take to enact gap-filling measures many developers would rush to destroy unprotected streams and wetlands, and the States could suffer devastating and irreplaceable losses. *E.g.* Florida Comments at 9 (if federal protections for intrastate non-navigable waters were reduced, there could be significant wetland loss in rapidly developing areas of Florida during the lag time prior to implementation of new State protections).

The States' experience in the aftermath of *SWANCC* is instructive. Less than two years after the *SWANCC* ruling, developers already had destroyed thousands of acres of isolated wetlands and other isolated waters even though the ruling left open other bases for federal jurisdiction over those waters. *See* Traci Watson, *Developers rush to build in wetlands after ruling*, USA TODAY, Dec. 6, 2002, at 15A. Indeed, the bulldozers were ready to move as soon as

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[15] Brief for the Petitioner, at 30, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*").

developers received notice of the *SWANCC* ruling: "The very day [*SWANCC*] hit the press, I was driving from Galveston to Houston, and I counted no less than six huge tracts of land where bulldozers were knocking everything down," says James Jones, a senior consultant with a wetlands firm and a former wetlands regulator. "And they hadn't been developed because there were isolated wetlands in them." *Id.*[16]

In short, Petitioners have it exactly backwards in arguing that the Court should read the Clean Water Act narrowly to avoid a change in the State-federal balance. As described above, the Corps' and EPA's longstanding reading of the Act is essential to maintaining the well-established State-federal partnership.

III. The Congress May Prevent the Destruction of Intrastate Non-Navigable Waters as Necessary and Proper Regulation of Activity that Threatens Channels of Commerce.

The natural meaning of the phrase "waters of the United States" includes waters within our nation's borders regardless of their navigability. This plain meaning is fully

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[16] During an unrelated, temporary regulatory gap at the federal level, more than 20,000 acres of wetlands were drained and more than 150 miles of streams channelized without section 404 reviews, significantly increasing the risk of flooding and harm to downstream properties and pollution of streams and rivers. 65 Fed. Reg. 50108 (Aug. 16, 2000). Some developers evidently concluded that "if you don't ask, you don't have to worry about being told no." 66 Fed. Reg. 4550, 4569 (Jan. 17, 2001). For a similar, recent example from the context of zoning, see Amy Gardner, *Loudoun Developers Sprint to File Plans: Applications for 21,000 Homes Submitted in Bid to Outrun Limits in County*, WASHINGTON POST, January 10, 2006, at B1.

consonant with the Act's express purpose to restore and maintain the ecological integrity of "the Nation's waters." 33 U.S.C. § 1251(a). And the explicit statutory reference to the protection of "wetlands" in section 404(g)(1) of the Act provides clear textual evidence that these waters include adjacent wetlands. *Id.* § 1344(g)(1).

Indeed, the entirety of section 404(g) would be rendered nugatory if the term "navigable waters" were read to reach only traditional navigable waters and their adjacent wetlands. That provision authorizes a State to administer its own permit program for the discharge of dredge and fill material into "navigable waters" in lieu of the federal program, but it expressly prevents a State from assuming authority over traditional navigable waters, thereby retaining federal jurisdiction over these waters.[17] If the phrase "navigable waters" were limited to traditional navigable waters, there would be nothing left for the States to regulate under section 404(g), and the entire provision would be without effect. *See* Brief of the States of New York, Michigan, *et al.* as *Amicus Curiae* in Support of Respondents, at Section II.

The doctrine of grave constitutional doubt does not require a different analysis. The State comments shed important light on this question. They illustrate how the protection of intrastate tributaries and their adjacent wetlands – even those streams and adjacent wetlands miles from traditional navigable waters – is essential to

[17] 33 U.S.C. § 1344(g)(1) (a State may not assume exclusive authority over "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce * * * including * * * wetlands adjacent thereto").

any comprehensive effort to protect our traditional navigable waters. There is no attenuated string of connections necessary to link the concerns expressed by the States to interstate commerce. Rather, the States show that protecting wetlands is critical to preventing floods and protecting the quality of our nation's traditional navigable waters. Limiting the destruction of tributaries is both a necessary and a proper congressional action to protect traditional navigable waters – the quintessential "channel of interstate commerce."

The State comments also explain why States acting alone cannot effectively address the harm to traditional navigable waters caused by the destruction of headwater streams and wetlands. Downriver States cannot control the actions of their upriver neighbors, and these upriver States have strong incentives to choose growth over resource protection because much of the cost of resource destruction is exported. As the Court declared in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), "[t]he power granted Congress [under the Commerce Clause] is a positive power * * * to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." *Id.* at 552. Specifically in the context of environmental law, the Court held in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 282.

The States also warn that a reduction in federal protections could lead to a regulatory "race-to-the-bottom."

The existence of interstate externalities skews the political incentives against environmental protection in both upstream and downstream States. Voters in upstream States might well reject regulatory measures that will impose significant costs where they live while delivering benefits only to communities downstream. Voters in downstream States might well conclude that regulation in their State is not worthwhile because it cannot solve the environmental problem by itself due to the lack of protections in upstream States. *See generally* REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING "OUR FEDERALISM" 21-28 (Douglas T. Kendall ed., 2004). As the Court observed in *Hodel*, "prevention of this sort of destructive interstate competition is a traditional role for congressional action under the Commerce Clause." 452 U.S. at 282.

Due to the tremendous harm to navigable channels of commerce and downstream States that would result from the loss of intrastate non-navigable waters, federal protections for these waters lie at the very heart of federal Commerce Clause authority. For more than 100 years, the Court has recognized that federal Commerce Clause power over navigable waters as channels of commerce extends to the entire watershed, including non-navigable tributaries. *E.g.*, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703, 708 (1899) (upholding federal jurisdiction over non-navigable portions of the Rio Grande).

The early cases like *Rio Grande Dam* largely involved navigability, but the Court soon recognized that Congress may use the same broad Commerce Clause power to promote other values and interests, such as flood control. In *Oklahoma v. Atkinson*, 313 U.S. 508 (1941), for example, the Court unanimously upheld the assertion of federal

Commerce Clause authority over 150,000 acres (including vast expanses of uplands) surrounding the Red River, a non-navigable tributary of the Missouri River, to improve flood control and produce hydropower. The Court stressed it is entirely appropriate to exercise this authority throughout "the entire basin" (*id.* at 525) even where the flood control enhancement was "somewhat conjectural" (*id.* at 526). In language that could not be clearer, the Court emphasized "[t]here is no constitutional reason why Congress cannot, under the commerce power, treat *the watersheds* as a key to flood control on navigable streams and their tributaries." *Id.* at 525 (emphasis added).

Unlike the Migratory Bird Rule at issue in *SWANCC*, which was untethered from channels of commerce, the federal protections at issue here are essential to the protection of our nation's navigable waters, which serve as channels of commerce. Moreover, Congress may regulate the destruction of intrastate non-navigable wetlands and other waters as a class of activity due to harm caused by the class as a whole, even though certain instances might have only a trivial impact. *See, e.g.*, *Gonzales v. Raich*, 125 S. Ct. 2195, 2206 (2005). The Court applied this class-of-activity analysis to the Clean Water Act in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 n.9 (1985) (the Corps may regulate wetlands adjacent to traditional navigable rivers even though "it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water").

Accordingly, the doctrine of grave constitutional doubt has no application here. This doctrine should not be used to create "statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate." *Almendarez-Torres v.*

United States, 523 U.S. 224, 238 (1998). It properly applies only where the statute is "genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a fair one." *Id.*; *accord*, *Rust v. Sullivan*, 500 U.S. 173, 190-191 (1991) (declining to apply doctrine although petitioner's constitutional claims were not "without some force").

The underlying purpose of the doctrine – the effectuation of congressional will – makes it especially inappropriate where, as here, the Congress sought to exercise its full constitutional authority. *See* S. Conf. Rep. No. 92-1236, at 144 (1972) (the conferees intend that the Act "be given the broadest possible constitutional interpretation"); S. Rep. No. 95-370, at 75 (1977) (the Act "exercise[s] comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent."). To implement congressional will in this context, the Court needs to decide the Commerce power issue, and not avoid that responsibility through a narrowing construction that would directly undercut Congress's express intent to exercise its full constitutional authority.

CONCLUSION

The judgments of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

A LIST OF STATE COMMENTS REGARDING THE DEFINITION OF "WATERS OF THE UNITED STATES" URGING CONTINUED FEDERAL PROTECTION FOR INTRASTATE TRIBUTARIES AND ADJACENT WETLANDS

(The comments are available at http://www.asiwpca.org/statecomments.htm)

Arizona:	Letter from Duane L. Shroufe, Director, Arizona Game and Fish Department, to U.S. Environmental Protection Agency (April 15, 2003)
Arizona:	Letter from Karen L. Smith, Director, Water Quality Division, Arizona Department of Environmental Quality, to U.S. Environmental Protection Agency (April 15, 2003)
Arkansas:	Letter from Scott Henderson, Director, Arkansas Game and Fish Commission, to U.S. Environmental Protection Agency (April 15, 2003)
California:	Letter from Arthur G. Baggett, Jr., Chair, State Resources Control Board, to U.S. Environmental Protection Agency (March 14, 2003)
California:	Letter from Mary D. Nichols, Secretary, California Resources Agency, and Winston Hickox, Secretary, California Environmental Protection Agency, to U.S. Environmental Protection Agency (July 3, 2003)
Delaware:	Letter from John A. Hughes, Secretary, Delaware Department of Natural Resources and Environmental Control, to

U.S. Environmental Protection Agency (April 16, 2003)

Florida: Letter from Janet G. Llewellyn, Deputy Director, Division of Water Resource Management, Florida Department of Environmental Protection, to U.S. Environmental Protection Agency (April 16, 2003)

Georgia: Letter from David Waller, Director, Georgia Department of Natural Resources, to U.S. Environmental Protection Agency (April 17, 2003)

Hawaii: Letter from June F. Harrigan-Lum, Manager, Environmental Planning Office, Hawaii Department of Health, to U.S. Environmental Protection Agency (April 16, 2003)

Idaho: Letter from Dirk Kempthorne, Governor of Idaho, to U.S. Environmental Protection Agency (April 16, 2003)

Illinois: Letter from Joel Brunsvold, Director, Illinois Department of Natural Resources, to U.S. Environmental Protection Agency (April 11, 2003)

Indiana: Letter from Lori F. Kaplan, Commissioner, Indiana Department of Environmental Management, to U.S. Environmental Protection Agency (April 16, 2003)

Iowa: Letter from Jeffery R. Vonk, Director, Iowa Department of Natural Resources, to U.S. Environmental Protection Agency (March 31, 2003)

Kansas:	Letter from Chris Hase, Environmental Services Section, Kansas Department of Wildlife and Parks, to U.S. Environmental Protection Agency (April 15, 2003)
Kentucky:	Letter from Jeffery W. Pratt, Director, Division of Water, Kentucky Natural Resources and Environmental Protection Cabinet, to U.S. Environmental Protection Agency (March 13, 2003)
Louisiana:	Letter from James H. Jenkins Jr., Secretary, Louisiana Department of Wildlife and Fisheries, to U.S. Environmental Protection Agency (April 1, 2003)
Maine:	Letter from David Van Wie, Director, Bureau of Land and Water Quality, Maine Department of Environmental Protection, to U.S. Environmental Protection Agency (April 16, 2003)
Massachusetts:	Letter from Cynthia Giles, Assistant Commissioner, Massachusetts Department of Environmental Protection, to U.S. Environmental Protection Agency (April 16, 2003)
Massachusetts:	Letter from Russ Cohen, Rivers Advocate, Massachusetts Riverways Program, Massachusetts Department of Fish and Wildlife, to U.S. Environmental Protection Agency (February 28, 2003)
Michigan:	Letter from Steven E. Chester, Director, Michigan Department of Environmental Quality, to U.S. Environmental Protection Agency (April 16, 2003)

Minnesota:	Letter from Gene Merriam, Commissioner, Minnesota Department of Natural Resources, Sheryl Corrigan, Commissioner, Minnesota Pollution Control Agency, and Ronald Harnack, Executive Director, Minnesota Board of Water and Soil Resources, to U.S. Environmental Protection Agency (April 8, 2003)
Minnesota:	Letter from Tim Pawlenty, Governor of Minnesota, to U.S. Environmental Protection Agency (April 14, 2003)
Missouri:	Letter from John D. Hoskins, Director, Missouri Department of Conservation, to U.S. Environmental Protection Agency (February 28, 2003)
Missouri:	Letter from Norman P. Stucky, Fisheries Division Administrator, Missouri Department of Conservation – Fisheries, to U.S. Environmental Protection Agency (March 12, 2003)
Missouri:	Letter from Scott B. Totten, Division Director, Water Protection and Soil Conservation, Missouri Department of Natural Resources, to U.S. Environmental Protection Agency (March 4, 2003)
Montana:	Letter from Jan P. Sensibaugh, Director, Montana Department of Environmental Quality, to U.S. Environmental Protection Agency (April 16, 2003)
Nebraska:	Letter from Mike Linder, Director, Nebraska Department of Environmental Quality, to U.S. Environmental Protection Agency (April 11, 2003)

Nebraska:	Letter from Kirk Nelson, Assistant Director, Nebraska Department of Game & Parks, to U.S. Environmental Protection Agency (April 2, 2003)
New Jersey:	Letter from Bradley M. Campbell, Commissioner, New Jersey Department of Environmental Protection, to U.S. Environmental Protection Agency (April 15, 2003)
New Mexico:	Letter from Larry G. Bell, Director, New Mexico Department of Game and Fish, to U.S. Environmental Protection Agency (April 15, 2003)
New Mexico:	Letter from Bill Richardson, Governor of New Mexico, to U.S. Environmental Protection Agency (March 5, 2003)
New York:	Letter from Peter Lehner, Bureau Chief, Environmental Protection Bureau, New York Attorney General's Office, to U.S. Environmental Protection Agency (April 16, 2003)
New York:	Letter from Erin M. Crotty, Commissioner, New York Department of Environmental Conservation, to U.S. Environmental Protection Agency (March 27, 2003)
North Carolina:	Letter from David R. Cox, Technical Guidance Supervisor, North Carolina Wildlife Commission, to U.S. Environmental Protection Agency (April 15, 2003)
North Dakota:	Letter from Dean Hildebrand, Director, North Dakota Game and Fish Department, to U.S. Environmental Protection Agency (April 14, 2003)

Ohio:	Letter from Samuel W. Speck, Director, Ohio Department of Natural Resources, to U.S. Environmental Protection Agency (March 3, 2003)
Oklahoma:	Letter from Greg D. Duffy, Director, Oklahoma Department of Wildlife Conservation, to U.S. Environmental Protection Agency (April 14, 2003)
Pennsylvania:	Letter from John T. Hines, Acting Deputy Secretary for Water Management, Pennsylvania Department of Environmental Protection, to U.S. Environmental Protection Agency (April 16, 2003)
Rhode Island:	Letter from Jan H. Reitsma, Director, Rhode Island Department of Environmental Management, to U.S. Environmental Protection Agency (April 16, 2003)
South Carolina:	Letter from Alton C. Boozer, Chief, Bureau of Water, South Carolina Department of Health and Environmental Control, to U.S. Environmental Protection Agency (April 16, 2003)
South Carolina:	Letter from Robert E. Duncan, Environmental Programs Director, South Carolina Department of Natural Resources, to U.S. Environmental Protection Agency (March 21, 2003)
South Dakota:	Letter from John L. Cooper, Department Secretary, Department of Game, Fish and Parks, to U.S. Environmental Protection Agency (April 14, 2003)
South Dakota:	Letter from Steven M. Pirner, Secretary, South Dakota Department of Environment and Natural Resources, to U.S.

	Environmental Protection Agency (April 16, 2003)
Tennessee:	Letter from Gary T. Myers, Executive Director, Tennessee Wildlife Resources Agency, to U.S. Environmental Protection Agency (February 26, 2003)
Texas:	Letter from Margaret Hoffman, Executive Director, Texas Commission on Environmental Quality, to U.S. Environmental Protection Agency (April 16, 2003)
Texas:	Letter from Thomas G. Heger, Texas Parks and Wildlife Department, to U.S. Environmental Protection Agency (April 16, 2003)
Vermont:	Letter from Jeffrey Wennberg, Commissioner, Vermont Agency of Natural Resources, to U.S. Environmental Protection Agency (April 16, 2003)
Virginia:	Letter from S. René Hypes, DCR-DNH Project Review Coordinator, Virginia Department of Conservation, to U.S. Environmental Protection Agency (April 14, 2003)
Virginia:	Letter from William L. Woodfin, Jr., Director, Virginia Department of Game, to U.S. Environmental Protection Agency (April 15, 2003)
Washington:	Letter from Sabra W. Hull, Wetlands Specialist, Land Management Division, Washington Department of Natural Resources, to U.S. Environmental Protection Agency (April 15, 2003)
West Virginia:	Letter from William D. Brannon, Acting Director, Division of Water and Waste Management, West Virginia Department

	of Environmental Protection, to U.S. Environmental Protection Agency (April 16, 2003)
West Virginia:	Letter from Curtis I. Taylor, Chief, Wildlife Resources Section, West Virginia Department of Natural Resources – Wildlife, to U.S. Environmental Protection Agency (February 26, 2003)
Wisconsin:	Letter from P. Scott Hassett, Secretary, Wisconsin Department of Natural Resources, to U.S. Environmental Protection Agency (April 8, 2003)
Wyoming:	Letter from Julie Kozlowski, Assistant Director, Office of Federal Land Policy, John Jackson, Administrator, Planning, Wyoming Department of Fish and Game, and Bill Wichers, Deputy Director, Wyoming Water Development Commission, to U.S. Environmental Protection Agency (March 3, 2003)